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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Petitioner,

—v.—

ALLAN BAKKE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF NORTHERN CALIFORNIA, THE ACLU OF SOUTHERN CALIFORNIA, *AMICI CURIAE*

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TABLE OF CONTENTS

PAGE

Interest of the *Amici* 1

Statement of the Case 4

ARGUMENT 6

A. Petitioner's Special Admission Program, Designed to Remedy Racial Injustices and to Insure That Traditionally Disadvantaged Minorities Count Equally, Promotes the Individual Equality Necessary to Enjoyment of Individual Liberty in a Democratic Society 9

B. Petitioner's Special Admission Program, Ameliorating the Status of Traditionally Disadvantaged Minorities, and Imposing No Stigmatic Injury on Individuals Ineligible for the Program, Does Not Violate the Fourteenth Amendment 14

CONCLUSION 19

TABLE OF AUTHORITIES

Cases:

Bakke v. Regents of the University of California, 18 Cal.3d 34 (1976) ..... *Passim*

Brown v. Board of Education, 347 U.S. 483 (1945) 17

Califano v. Goldfarb, 97 S.Ct. 1021 (1977) 15, 16

Califano v. Webster, 97 S.Ct. 1192 (1977) 15, 16

Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) 11

PAGE

Castaneda v. Partida, 97 S.Ct. 1272 (1977) 6, 8
Castro v. State of California, 2 Cal.3d 223 (1970) 11
Craig v. Boren, 97 S.Ct. 451 (1976) 16
Crawford v. Board of Education of the City of Los Angeles, 17 Cal.3d 280 (1976) 9

Dred Scott v. Sandford, 60 U.S. (19 How.) 691 (1857) 17

Franks v. Bowman Transportation Co., Inc., 424 U.S. 747 (1976) 11
Frontiero v. Richardson, 411 U.S. 677 (1973) 15

Gaston County v. United States, 395 U.S. 285 (1969) 7

Hernandez v. Texas, 347 U.S. 475 (1954) 6

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 15

Katzenbach v. Morgan, 384 U.S. 641 (1966) 11
Keyes v. School District No. 1, 413 U.S. 189 (1973) 6

Lau v. Nichols, 414 U.S. 563 (1974) 9, 11, 16

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 7
Morton v. Mancari, 417 U.S. 535 (1974) 17

NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974) 11

Oyama v. California, 332 U.S. 633 (1948) 6

Plessy v. Ferguson, 163 U.S. 537 (1896) 17

Reed v. Reed, 404 U.S. 71 (1971) 16

PAGE

San Francisco Unified School Dist. v. Johnson, 3 Cal.3d 937 (1971) 9, 11
Slaughterhouse Cases, 83 U.S. (16 Wall) 36 (1873) 17
South Carolina v. Katzenbach, 383 U.S. 301 (1966) 15
Spangler v. Pasadena City Board of Education, 311 F.Supp. 501 (C.D. Cal. 1970) 9
Stanton v. Stanton, 421 U.S. 7 (1975) 16
Strauder v. West Virginia, 100 U.S. 303 (1880) 6
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 10, 11

Taylor v. Louisiana, 419 U.S. 522 (1975) 16
Trimble v. Gordon, 97 S.Ct. 1459 (1977) 6

United Jewish Organizations of Williamsburgh v. Carey, 97 S.Ct. 996 (1977) 7, 8, 14, 15, 16
United States v. Carolene Products Co., 304 U.S. 144 (1938) 6
United States v. Ironworkers, Local 86, 443 F.2d 544 (9th Cir. 1971) 11
United States v. Masonry Cont. Ass'n of Memphis, Inc., 497 F.2d 871 (6th Cir. 1974) 11

Village of Arlington Heights v. Metropolitan Housing Development Corp., 97 S.Ct. 555 (1977) 7

Washington v. Davis, 426 U.S. 229 (1976) 7
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 16

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 6

PAGE

Regulations:

7 CFR §§15.3(b) (6) (i) & (ii) 18
10 CFR §4.12(f) 18
13 CFR §§112.3(b) (3), 113.3-1(a) 18
14 CFR §379.3(b) (3) 18
14 CFR §§1250.103-2(7) (e), 1250.103-4(f) & (g) 18
18 CFR §302.3(b) (6) 18
22 CFR §§141.3(b) (5) (i) & (ii) 18
22 CFR §209.4(b) (6) 18
24 CFR §1.4(b) (6) 18
28 CFR §§31.3(b) (6) (i) & (ii) 18
28 CFR §§42.203(1) & (2) 18
29 CFR §§31.3(6) (i) & (ii), 31.3(7) (i) & (ii) 18
38 CFR §18.3(b) (6) (i) & (ii) 18
41 CFR §101-6.204-2(a) (4), 101-6.206(i) & (j) 18
43 CFR §§17.3(b) (4) (i) & (ii), 17.3(d) 18
45 CFR §80.3(b) (6) (i) & (ii) 18
45 CFR §611.3(b) (6) 18
45 CFR §§1010.4(b) & (d) 18

Books and Articles:

G. Allport, *The Nature of Prejudice* (1954) 14

D. Bell, *Race, Racism and American Law* (1973) 8

A. Bickel, "The Original Understanding and the Segregation Decision," 68 Harv.L.Rev. 1 (1955) 6

A. Blaustein & R. Zangrando *Civil Rights and the American Negro* (1968) 8

J. Greenberg, *Race Relations and American Law* (1959) 9

PAGE

Health Policy Advisory Center, *The Myth of Reverse Discrimination: Declining Minority Enrollment in New York City's Medical Schools* (1977) 15

Institute of Medicine, National Academy of Sciences, "Physician Choice of Specialty and Geographic Location: A Survey of the Literature," *Medical Reimbursement Policies* (March, 1976) 13

D. Johnson, *et al.*, "Recruitment and Progress of Minority Medical School Entrants, 1970-72," *J. of Med. Education* (July, 1975) 13

R. Kluger, *Simple Justice* (1975) 17

A. Lindsay, *The Modern Democratic State*, 252 (1943) 10

J. Rawls, *A Theory of Justice* (1971) 12, 13

Report of the National Advisory Commission on Civil Disorders (1968) 9

G. Simpson & J. Yinger, *Racial and Cultural Minorities* (1953) 9

G. Simpson & J. Yinger, *Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination* (1972) 14

U.S. Dept. of HEW, Health Resources Administration, Bureau of Health Resources Development, *Characteristics of Black Physicians in the United States* (1975) 13

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Interest of the *Amici**

For 57 years, the American Civil Liberties Union has devoted itself exclusively to protecting the fundamental civil rights of the people of the United States. The ACLU of Northern California and the ACLU of Southern California are regional affiliates of the American Civil Liberties Union.

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* The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

On occasion, various civil rights of the people come into conflict. The issue posed by this case represents such a conflict.

Starting almost a decade ago, the governing bodies of our 250,000-member national organization have vigorously debated the issue of "affirmative action"—particularly the conflict caused when the perceived need to eradicate the cumulative effects of systemic discrimination against minorities results in transition period programs for which majority whites are ineligible.

The intensity and vigor of these discussions have heightened the ACLU's realization that the major civil liberties issue still facing the United States is the elimination, root and branch, of all vestiges of racism. No other asserted claim of right surpasses the wholly justified demand of the nation's discrete and insular minorities for access to the American mainstream from which they have so long been excluded.

Our assessment of the current status of racial justice in the United States coincides with that of California Supreme Court Justice Tobriner, expressed in his dissent in the instant case:

> "Two centuries of slavery and racial discrimination have left our nation an awful legacy, a largely separated society in which wealth, educational resources, employment opportunities—indeed all of society's benefits—remain largely the preserve of the white-Anglo majority." 18 Cal.3d at 91.

In response to this intolerable reality, the ACLU has adopted the following statement of policy:

> "The root concept of the principle of non-discrimination is that individuals should be treated individually, in accordance with their personal merits, achievements and potential, and not on the basis of the supposed attributes of any class or caste with which they may be identified. However, when discrimination—and particularly when discrimination in employment and education—has been long and widely practiced against a particular class, it cannot be satisfactorily eliminated merely by the prospective adoption of neutral, 'color-blind' standards for selection among the applicants for available jobs or educational programs. Affirmative action is required to overcome the handicaps imposed by past discrimination of this sort; and, at the present time, affirmative action is especially demanded to increase the employment and the educational opportunities of racial minorities."

Pursuant to this policy, the ACLU has further recognized that "in order to eradicate the effects of past discrimination and to increase the representation of substantially underrepresented groups," it is at times necessary to "support a requirement that a certain number of persons within a group which has suffered discrimination be employed [or admitted] within a particular timetable."

The ACLU believes that a nation which has engaged in centuries of subjugation, segregation, and discrimination cannot afford to take seriously the exhortations of those who now insist that under no circumstances should we abide selection processes in which race counts in the calculus. It is generations too late for that notion of neutrality to operate as anything but a preserver of the status quo.

The United States cannot remedy the egregious wrongs that blight the nation's history by leaving the victims of racism where *Brown* v. *Board of Education* found them. We believe it would be a national tragedy and a roadblock to realization of the ideal of individual equality if this Court were to adopt the conclusions of those who are ready to bury the concept of affirmative action in its infancy. The country still has not heeded the almost decade-old warning of the National Advisory Commission on Civil Disorders that vigorous governmental action is necessary to prevent this nation from becoming two separate and unequal societies, one minority and one white.

Accordingly, we urge this Court to reverse the judgment of the Supreme Court of California, thereby allowing the University of California at Davis to pursue its compelling objectives to ameliorate the status of traditionally disadvantaged minorities, to increase the diversity of its student body, and to augment the number of minorities in high status positions in the community.

Statement of the Case

In an effort "to promote diversity in the student body and the medical profession, and to expand medical education opportunities to persons from economically or educationally disadvantaged backgrounds," the Medical School of the University of California at Davis implemented a special admission program which explicitly permitted consideration of "the minority status of an applicant as only one factor in selecting students for admission." *Bakke* v. *Regents of the University of California*, 18 Cal.3d 34, 39 (1976).

The overwhelming majority of students in the University's Medical School are white. A few are minorities.[1]

Given the high number of applications and the limited number of students who may be admitted, many applicants are denied admission to the Medical School.[2] Whites who seek admission are denied it.[3] So too are minorities.[4]

Allan Bakke, a white who was denied admission, challenges his nonadmission as a violation of the Fourteenth Amendment. He does not challenge the University's admission preference for applicants who intend to reside in Northern California[5] nor its admission preference for applicants whose spouses are medical students.[6] Bakke

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[1] Pursuant to the University's admission programs, 84 of the available 100 positions have been filled with nonminority students while the remaining 16 slots have been filled with minority students. 18 Cal.3d at 38-44. Prior to the adoption of the special admission program, only one or two minorities had been enrolled in the Medical School. 18 Cal.3d at 64. Without the special admission program, the Medical School undoubtedly would have remained nearly all white. As stated by the chairman of the admission committee: "'[T]here would be few, if any, black students and few Mexican-American, Indian, or Orientals from disadvantaged backgrounds in the Davis Medical School if the special admission program . . . did not exist.'" 18 Cal.3d at 89.

[2] In 1973 there were 2644 applicants for 100 positions. In 1974 there were 3737 applicants for 100 positions. 18 Cal.3d at 38.

[3] Of the 2347 applicants who were considered under the regular admission program in 1973, 815 were selected for interviews and 84 were admitted to the Medical School. Of the 3109 applicants under the regular admission program in 1974, 462 were selected for interviews and 84 were admitted. 18 Cal.3d at 41.

[4] Of the 297 disadvantaged applicants who applied under the special admission program in 1973, 71 were interviewed and 16 admitted. In 1974, of the 628 disadvantaged applicants, 88 were interviewed and 16 admitted. 18 Cal.3d at 43.

[5] 18 Cal.3d at 42.

[6] *Id.*

singles out for challenge the special admission program pursuant to which the University has attempted to insure that minorities will be at least minimally represented in its Medical School and in the medical profession as a whole.

The issue in this case is not whether the Constitution compels the University to adopt a special admission program for minorities, but only whether the Constitution *permits* the University to pursue that course.

Argument

The special admission program voluntarily adopted by the University of California serves vital educational and social policies. It promotes equality. It is constitutional.

1. The unmistakably clear, central purpose of the Fourteenth Amendment is the protection of discrete and insular minorities.[7] *Strauder* v. *West Virginia*, 100 U.S. 303 (1880); A. Bickel, "The Original Understanding and the Segregation Decision," 69 Harv.L.Rev. 1 (1955). As Mr. Justice Rehnquist recently stated: "Since the [Fourteenth] Amendment grew out of the Civil War and the freeing of the slaves, the core prohibition was early held to be aimed at the protection of blacks. . . . A logical, though not inexorable, next step, was the extension of the protection to prohibit classifications resting on national origin." *Trimble* v. *Gordon*, 97 S.Ct. 1459, 1470 (1977) (dissenting opinion

[7] The "discrete and insular minorities," *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), protected by the Fourteenth Amendment are those minorities in positions analogous to that of blacks. *See, e.g., Castaneda* v. *Partida*, 97 S. Ct. 1272 (1977); *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973); *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Oyama* v. *California*, 332 U.S. 633 (1948); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

of Rehnquist, J.) (citations omitted). If the overriding purpose of the Fourteenth Amendment is thus to protect minorities, it would be a cruel irony for this Court to turn that shield into a weapon against state governmental efforts to redress cumulative racial injustices.[8]

2. Any Fourteenth Amendment scrutiny of the program here at issue, a plan plainly designed to ameliorate systemic discrimination against minorities, leads inevitably to the conclusion that the classification involved is not motivated by prejudice and yields "no racial slur or stigma with regard to whites or any other race." *United Jewish Organizations of Williamsburgh* v. *Carey*, 97 S.Ct. 996, 1009 (1977) (plurality opinion of White J., with Rehnquist J., and Stevens J.). In short, no racially discriminatory animus marks the selection method challenged by Bakke. *Cf. Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 97 S.Ct. 555 (1977); *Washington* v. *Davis*, 426 U.S. 229 (1976). Of course, racial "awareness is not . . . the equivalent of discriminatory intent." *United Jewish Organizations of Williamsburgh* v. *Carey*, 97 S.Ct. 996, 1017 (1977) (concurring opinion of Stewart J., with Powell J.). Nor is "permissible use of racial criteria . . . confined to eliminating the effects of past discriminatory redistricting or apportionment." *United Jewish Organizations of Williamsburgh* v. *Carey*, 97 S.Ct. 996, 1007 (1977) (plurality opinion of White J., with Brennan J., Blackmun J., and Stevens J.). "The clear purpose with which the

[8] *Cf. Gaston County* v. *United States*, 395 U.S. 285, 295-297 (1969). *See also McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 806 (1973) ("childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, [should] not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives").

[University of California] acted—in response to [its strong interest 'to promote diversity in the student body and the medical profession,' 18 Cal.3d at 39]—forecloses any finding that it acted with the invidious purpose of discriminating against white[s]." *United Jewish Organizations of Williamsburgh* v. *Carey*, 97 S.Ct. 996, 1017 (1977) (concurring opinion of Stewart, J., with Powell, J.). Moreover, given the marked white dominance in the University of California's faculty and administration, "rational inferences from the most basic facts in a democratic society render improbable [Bakke's] claim of an intent to discriminate against him and other [whites]. . . . 'If people in charge can choose whom they want, it is unlikely they will discriminate against themselves.'" *Castaneda* v. *Partida*, 97 S.Ct. 1272, 1291 (1977) (dissenting opinion of Powell J., with Burger C.J., and Rehnquist J.) (citation omitted). Since the record below discloses no evidence of stigmatic harm to Bakke or any other white and no cumulative harm to members of the majority class, the benignly purposed special admission program is not inconsistent with the Fourteenth Amendment.

3. Finally, as this Court has recently clarified, it is not unconstitutional to adhere temporarily to a remedial classification whose "only discernible purpose . . . [is] the permissible one of redressing our society's longstanding disparate treatment of [minorities]." *Califano* v. *Webster*, 97 S.Ct. 1192, 1195 (1977) (per curiam), quoting from *Califano* v. *Goldfarb*, 97 S.Ct. 1021, 1028 n.8 (1977). That our society has long discriminated against minorities is undeniable.[9] That the State of California has long discriminated against minorities in education is equally undeniable.[10] For the State of California, through the special admission program at Davis, now to attempt to redress the harsh and cumulative disadvantages imposed on minorities is as commendable as it is constitutional.

[9] *See, e.g.*, D. Bell, *Race, Racism and American Law* (1973); A. Blaustein & R. Zangrando, *Civil Rights and the American Negro* (1968); J. Greenberg, *Race Relations and American Law* (1959); G. Simpson & J. Yinger, *Racial and Cultural Minorities* (1953). *See also Report of the National Advisory Commission on Civil Disorders* (1968).

[10] A number of the largest public school districts in California have been held to be unconstitutionally segregated. *See, e.g.*, *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (C.D. Cal. 1970); *Crawford* v. *Board of Education of the City of Los Angeles*, 17 Cal.3d 280 (1976); *San Francisco Unified School Dist.* v. *Johnson*, 3 Cal.3d 937 (1971). Equally significant is California's unlawful denial of bilingual educational opportunities to its discrete and insular minorities. *Lau* v. *Nichols*, 414 U.S. 563 (1974).

Each of the above stated reasons fully supports the constitutionality of the special admission program adopted by the University. Further, absent programs such as the one at issue, the ideal of individual equality is destined to remain in the next generation still an unfulfilled promise for members of this nation's discrete and insular minorities.

A. Petitioner's Special Admission Program, Designed to Remedy Racial Injustices and to Insure That Traditionally Disadvantaged Minorities Count Equally, Promotes the Individual Equality Necessary to Enjoyment of Individual Liberty in a Democratic Society.

The American concept of equal justice does not encompass a guarantee of equal conditions for everyone. It is not a premise of our system that minorities, whites—all individuals—should be guaranteed the same homes, the

same jobs, the same educational attainments, the same happiness. "[T]he conception of equality . . . which the Puritan movement of the seventeenth century contributed to modern democracy," the British philosopher A. D. Lindsay points out, was "an equality which was compatible with, even welcomed and demanded, differences . . . which were not denied. . . . [T]he practical import of this doctrine was not that all men ought to be treated as if they had equal capacities, but as if they all were equally to count." [11]

By extending to members of traditionally disadvantaged minorities opportunities that otherwise would be denied to them, the University of California is promoting the ideal that all individuals are equally to count in our society. For if discrete and insular minorities are rarely seen on our college campuses, in our medical, law and other professional schools, they will have no prospect of counting equally. Grossly disproportionate absence of minority group members from these places reflects the "awful legacy" of historic discrimination, 18 Cal.3d at 91, perpetuates notions and indicia of minority inequality, and invites future discrimination against minorities in diverse areas of human activity.

To advance the opportunity for traditionally disadvantaged minorities to count equally, the University of California, as an interim measure subject to continuing review, has classified applicants by race. Although similarly benign racial classifications have been upheld in a legion of cases,[12]

[11] A. Lindsay, *The Modern Democratic State*, 252 (1943).

[12] The classifications cited by Justice Mosk, 18 Cal.3d at 45, include the following:

"[C]lassifications . . . to achieve integration in the public schools [*Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *San Francisco Unified School Dist.* v. *Johnson*, 3 Cal.3d 937 (1971)], to require a school system to provide instruction in English to students of Chinese ancestry [*Lau* v. *Nichols*, 414 U.S. 563 (1974)], and to uphold the right of certain non-English speaking persons to vote [*Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Castro* v. *State of California*, 2 Cal.3d 223 (1970)]."

Justice Mosk's majority opinion for the California Supreme Court attempted to distinguish those cases. "In none of them," argued Justice Mosk, "did the extension of a right or benefit to a minority have the effect of depriving persons who were not members of a minority group of benefits which they would otherwise have enjoyed." 18 Cal.3d at 46.[13] The crux of Justice Mosk's decision in favor of Allan Bakke is that the benefit accorded discrete and insular minorities deprives Bakke of a benefit on grounds of race. But, given limited admissions to medical school, to admit Bakke is to exclude someone else. If the admission of Bakke is at the expense of the special admission program, then the State is disabled from meaningful promotion of the opportunities of minorities to overcome generations of rank discrimination. In essence, a decision for Bakke would disarm government agencies by stripping them of authority to prevent projection of past and continuing systemic discrimination long into the future.

[13] Justice Mosk's conclusion, of course, is not supported by the cases. For in a number of cases, cited elsewhere in his majority opinion, 18 Cal.3d at 57, the extension of employment rights to minorities has had the effect of depriving nonminorities of benefits they otherwise would have enjoyed: *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976); *United States* v. *Masonry Cont. Ass'n of Memphis, Inc.*, 497 F.2d 871 (6th Cir. 1974); *NAACP* v. *Allen*, 493 F.2d 614 (5th Cir. 1974); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971); *United States* v. *Ironworkers, Local 86*, 443 F.2d 544 (9th Cir. 1971). *See also* the cases cited by Justice Tobriner in his dissenting opinion, 18 Cal.3d at 71 n.5 & n.6.

A contemporary American philosopher, John Rawls, has attempted to deal in abstract terms with the questions of fairness at stake in the practices of the University of California. According to Rawls, "inequalities of wealth and authority, are just only if they result in compensating benefits for everyone and, in particular, for the least advantaged members of society. . . . [I]t may be expedient, but it is not just that some should have less in order that others may prosper. But there is no injustice in the greater benefits earned by a few provided that the situation of persons not so fortunate is thereby improved." [14]

Those admitted to the medical school obtain greater benefits than those not admitted. Only a very few persons among many qualified candidates can obtain this advantage. The State of California spends vast sums of money on those few fortunate persons and gives them the opportunity to become prestigious members of our society, holders of high status positions from which they derive great professional satisfaction, community esteem, and very substantial incomes.

Following Rawls, the greater benefits accorded the few who obtain admission to medical school would be unjust unless the situation of persons not so fortunate is thereby improved. One way the situation of the less fortunate could be improved is by admitting students who may be expected to provide very high quality medical care. Another way the greater benefits accorded the few could work to the advantage of the less fortunate is by admitting students who may be expected to provide medical care to segments of the population not adequately served.

[14] J. Rawls, *A Theory of Justice*, 14-15 (1971).

Thus, medical schools have traditionally sought a geographical balance among their students. Schools might also serve this purpose by admitting members of discrete and insular minorities who may be expected to serve minority communities.[15] Still another way in which benefits given the few can work to the advantage of the less fortunate is by admitting individuals whose participation in the student body and in the profession would accelerate the day when the United States no longer bears the wounds or scars of a society that ascribes a different worth to members of majority and minority groups.

To admit Bakke to medical school in place of a member of a minority group would be, in the words of Rawls, "expedient, but . . . not just" unless "the situation of persons not so fortunate is thereby improved." [16] The University of California special admission program, on the other hand, is patently just for it works to improve the situation of the less fortunate. By enabling a few members of discrete and insular minorities to rise to positions of prestige and influence, and by providing necessary role models for talented youths who would not otherwise aspire to professional careers, the special admission program

[15] Minority physicians, in fact, are more likely than nonminority physicians to engage in primary care practices particularly in medically underserved areas such as in the rural South and in large cities where there are large concentrations of low income, minority populations. *See, e.g.*, Institute of Medicine, National Academy of Sciences, "Physician Choice of Specialty and Geographic Location: A Survey of the Literature," in *Medical Reimbursement Policies* March, 1976); D. Johnson, *et al.*, "Recruitment and Progress of Minority Medical School Entrants, 1970-1972," in *J. of Med. Education* (July, 1975); U.S. Dept. of HEW, Health Resources Administration, Bureau of Health Resources Development, *Characteristics of Black Physicians in the United States* (1975).

[16] J. Rawls, *A Theory of Justice*, 15 (1971).

clears the path for other members of discrete and insular minorities to share equally the advantages of our society. Indeed, the fact that some members of discrete and insular minorities enjoy positions of prestige and influence also shapes the way in which members of the majority treat all minorities.[17] In these ways, the less fortunate members of discrete and insular minorities, who themselves cannot benefit directly from the University of California's special admission program, nevertheless are assisted by the program in achieving a long overdue equal count in American society.

B. Petitioner's Special Admission Program, Ameliorating the Status of Traditionally Disadvantaged Minorities, and Imposing No Stigmatic Injury on Individuals Ineligible for the Program, Does Not Violate the Fourteenth Amendment.

Although the theories of equality advanced by Lindsay and Rawls have not been spotlighted in equal protection opinions, the decisions of this Court are entirely compatible with those theoretical models.

In *United Jewish Organizations of Williamsburgh* v. *Carey*, 97 S.Ct. 996 (1977), the State, through a racially conscious redistricting plan, created a number of minority legislative districts. Whites in those districts objected. The Court found the plan consistent with the Fourteenth Amendment since "the plan left white majorities in approximately 70% of the assembly and senate districts in Kings County, which had a countywide population that was 65% white. Thus, even if voting in the county occurred strictly according to race, whites would not be under-

[17] *See, e.g.*, G. Allport, *The Nature of Prejudice* (1954); G. Simpson & J. Yinger, *Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination* (1972).

represented relative to their share of the population." 97 S.Ct. at 1010 (plurality opinion by White J., with Rehnquist J. and Stevens J.).

Here, as in *United Jewish Organizations*, the State, through a racially conscious plan, augmented the representation of minorities without stigmatizing whites or trammeling the expectations of the majority.[18] The special admission program left a white majority of 84% in the Davis medical school, in a State with a population that is only 75% white.[19] Thus, relative to their representation in the population, whites continue to have the largest representation in the Medical School.

In recent rulings on gender-based classifications, this Court has underscored the critical distinction between (1) government action that disadvantages groups historically subjected to discrimination, and (2) government action that directly addressed past injustices and serves to rectify them.[20] Disparate treatment based on sex is unconstitutional, the Court has ruled, when it is the byproduct of "romantic paternalism," *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973), or of "the role-typing society has long

[18] Rather than lessening majority admissions, special admission programs have been implemented concurrently with expanded medical school enrollments. Not surprisingly, the primary beneficiaries of such expanded enrollments have been the white applicants. *See* Health Policy Advisory Center, *The Myth of Reverse Discrimination: Declining Minority Enrollment in New York City's Medical Schools* (1977).

[19] 18 Cal.3d at 88 n.16.

[20] *Califano* v. *Webster*, 97 S. Ct. 1192 (1977); *Califano* v. *Goldfarb*, 97 S. Ct. 1021, 1028 n.8 (1977); *Frontiero* v. *Richardson*, 411 U.S. 677, 689 n.22 (1973), citing *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966).

imposed," *Stanton* v. *Stanton*, 421 U.S. 7, 15 (1975), and is not deliberately and specifically aimed at redressing past denial of equal counting.[21] But classification by gender is constitutional, the Court has clarified, in order "to remedy some part of the effect of past discrimination." *Califano* v. *Webster*, 97 S.Ct. 1192, 1195 (1977). Just as gender classification is permissible when it does not stigmatize, but is designed solely to serve a genuinely compensatory purpose,[22] so use of a racial criterion must withstand constitutional scrutiny when "the only discernible purpose . . . [is] the permissible one of redressing our society's longstanding disparate treatment of [minorities]." *Califano* v. *Webster*, 97 S.Ct. 1192, 1195 (1977), quoting from *Califano* v. *Goldfarb*, 97 S.Ct. 1021, 1028 n.8 (1977).

Redress of historic discrimination has been approved in other areas as well. In response to longstanding discrimination against non-English speaking groups, Congress has sanctioned, and this Court has upheld, public provision of more expensive education to such groups through bilingual programs. *Lau* v. *Nichols*, 414 U.S. 563 (1974). And, in view of our nation's historic discrimination against Indians, and special relationship with Indian tribes, this Court has upheld a federal statute re-

[21] *See* generally *Califano* v. *Goldfarb*, 97 S. Ct. 1021, 1026-1027 (1977); *Craig* v. *Boren*, 97 S. Ct. 451 (1976); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Reed* v. *Reed*, 404 U.S. 71 (1971); *cf. Taylor* v. *Louisiana*, 419 U.S. 522 (1975).

[22] But " 'mere recitation of a benign, compensatory purpose' " no longer shields a scheme that in fact rests on stereotypes of women as " 'the weaker sex,' " the ones "more likely to be child-rearers or dependents." *Califano* v. *Webster*, 97 S. Ct. 1192, 1195 (1977) (citations omitted). *See also* cases cited in n.21, *supra*. *Cf. United Jewish Organizations of Williamsburgh* v. *Carey*, 97 S. Ct. 996, 1014 n.3 (1977) (concurring opinion of Brennan, J.).

quiring strict employment preferences for reservation Indians. *Morton* v. *Mancari*, 417 U.S. 535 (1974).

Undoubtedly, however, the legacy of discrimination is most odious in the case of racial minorities. Upon the founding of this nation, a black was counted as but three-fifths of a white person. U.S. Constitution, art. 1, §2. The human disparity was even greater—for blacks were considered by this Court, decades later, as "beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect." *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 691, 701 (1857). The Fourteenth Amendment, whose central purpose was "the freedom of the slave-race . . . from the oppressions of those who had formerly exercised unlimited dominion over him," *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 71 (1873), provided promise of equality. But after *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), legally mandated segregation and subjugation again became the norm.[23] Not until *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954), was it courageously declared that separate is "inherently unequal."

Centuries of societal discrimination and oppression were not and could not have been reversed on that one day in 1954. To this day the Fourteenth Amendment's promise remains unfulfilled. The "awful legacy," 18 Cal.3d at 91, will continue to hold sway if this Court overrides the decisions of the University of California (and of other government agencies[24]) to foster the advancement of minor-

[23] R. Kluger, *Simple Justice* (1975).

[24] For example, HEW regulations implementing Title VI of the Civil Rights Act of 1964 require that recipients of federal

ities to the point where their members in fact count equally in our democracy.

The special admission program at Davis has as its purpose the permissible one of redressing our society's longstanding disparate treatment of minorities. The program serves that purpose modestly and without stigmatizing as inferior any individual outside its compass. Unquestionably, it is consistent with the dominant purpose of the Fourteenth Amendment and merits this Court's approbation.

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funding who have "previously discriminated against persons on the ground of race, color, or national origin . . . *must take affirmative action* to overcome the effects of prior discrimination." 45 C.F.R. §80.3(b)(6)(i) [emphasis added]. The regulations further provide that "[e]*ven in the absence of such prior discrimination, a recipient in administering a program may take affirmative action* to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." 45 C.F.R. §80.3(b)(6)(ii) (emphasis added). *See also* the identical affirmative action regulations in 28 C.F.R. §§42.203 (1) & (2) promulgated by the Law Enforcement Assistance Administration under the Crime Control Act of 1976. A vast number of other federal agencies have adopted similar affirmative action regulations pursuant to various civil rights acts. *See, e.g.*, Department of Agriculture, 7 C.F.R. §§15.3(b)(6)(i) & (ii); Nuclear Regulatory Commission, 10 C.F.R. §4.12(f); Small Business Administration, 13 C.F.R. §§112.3(b)(3), 113.3-1(a); Civil Aeronautics Board, 14 C.F.R. §379.3(b)(3); National Aeronautics and Space Administration, 14 C.F.R. §§1250.103-2(7)(e), 1250.103-4 (f) & (g); Tennessee Valley Authority, 18 C.F.R. §302.3(b)(6); Agency for International Development, 22 C.F.R. §209.4(b)(6); Department of State, 22 C.F.R. §141.3(b)(5)(i) & (ii); Housing and Urban Development, 24 C.F.R. §1.4(b)(6); Department of Justice, 28 C.F.R. §§31.3(b)(6)(i) & (ii); Department of Labor, 29 C.F.R. §§31.3(6)(i) & (ii), 31.3(7)(i) & (ii); Veterans Administration, 38 C.F.R. §§18.3(b)(6)(i) & (ii); General Services Administration, 41 C.F.R. §§101-6.204-2(a)(4), 101-6.206(i) & (j); Department of the Interior, 43 C.F.R. §§17.3(b)(4)(i) & (ii), 17.3(d); National Science Foundation, 45 C.F.R. §611.3 (b)(6); Community Services Administration, 45 C.F.R. §§1010.4 (b) & (d).

CONCLUSION

For the foregoing reasons, the American Civil Liberties Union, the ACLU of Northern California, and the ACLU of Southern California, *amici curiae*, urge this Court to reverse the judgment of the Supreme Court of California.

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